2013 IL App (1st) 112051-U

SIXTH DIVISION
December 13, 2013

No. 1-11-2051

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 18270
	)	
ROBERT KIMBROUGH,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court's failure to *sua sponte* inquire into defense counsel's competence in the absence of an allegation of or a clear basis for ineffectiveness was not error; defendant was subject to the three-year MSR term as a Class X offender; fines and fees order modified.

¶ 2 Following a bench trial, defendant Robert Kimbrough was found guilty of aggravated robbery and sentenced as a Class X offender to 12 years' imprisonment, followed by a three-year term of mandatory supervised release (MSR) and assessed certain fines and fees, including a $15 State Police Operations assessment (705 ILCS 105/27.3a (1.5) (West 2010)), and a $25 Violent Crime Victim Assistance assessment. 725 ILCS 240/10(c) (West 2010).

¶ 3 On appeal, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but argues that his cause should be remanded for a hearing under *People v. Krankel,* 102 Ill. 2d 181 (1984), because the trial court had a "clear basis" for suspecting ineffective assistance of

counsel. Defendant also argues that the period of MSR should be reduced to the two-year MSR term associated with his underlying Class 1 conviction. Defendant also requests certain corrections be made to the fines and fees order. We modify the fines and fees order, but otherwise affirm defendant's conviction and sentence.

¶ 4 The following evidence was presented at trial. In the early morning hours of September 30, 2010, Jimmy Brooks and Azalea Jones, were walking home from a liquor store where Mr. Brooks had consumed wine. They were confronted by a man who claimed to be armed with a gun. Both Ms. Jones and Mr. Brooks observed the man holding a metal object in his hand, which Mr. Brooks described as a partially concealed dark bar or pipe, approximately one foot in length. A struggle over Mr. Brooks' backpack ensued. The offender hit Mr. Brooks in the chest which caused him to let go of his backpack. The offender also went through Mr. Brooks' pockets and took a few dollars and keys. Meanwhile, Ms. Jones summoned an approaching squad car. When the squad car stopped, one of the officers exited the vehicle while the other officer drove after the offender who had fled.

¶ 5 Officer Reynaldo Serrato testified that he and his partner observed the robbery in progress while on patrol. The officer stated that the offender was standing above Mr. Brooks and attempting to take his backpack. When the officer exited his vehicle and announced his office, the offender fled. Officer Serrato had observed a side view of the offender for approximately two to three seconds before he fled. Office Serrato chased the offender on foot. He testified that the chase lasted approximately 20 to 30 seconds, and about a "half block," but acknowledged that during the preliminary hearing, he had testified the chase lasted approximately four to five seconds. Officer Serrato identified defendant in court as the offender.

¶ 6 As the chase ended, defendant hid behind a dumpster where Officer Serrato found him on the ground holding Mr. Brooks' backpack. Defendant attempted to get up three times and each time Officer Serrato shocked him with a Taser. Officer Serrato brought defendant back to the scene where the paramedics who were treating Mr. Brooks had removed the Taser darts from defendant.

According to Officer Serrato's testimony, Mr. Brooks and Ms. Jones then identified defendant in a show-up. Defendant was searched and he had $2 and a pack of Newport cigarettes. The backpack and the cash were returned to Mr. Brooks, however, Officer Serrato did not mention that Mr. Brooks' keys were found.

¶ 7 During cross examination, defense counsel, after observing that defendant was walking with a cane during the trial, asked Officer Serrato if defendant used a cane at the time of the incident. Officer Serrato stated that defendant did not use a cane at that time and, in fact, ran from him and jumped a fence to get away. When asked if defendant had told him of being shot in the leg, Officer Serrato testified that defendant, while in custody, informed the officer he had a leg injury, and kept repeating, "how can I be running if I have an injured leg?"

¶ 8 Neither Mr. Brooks nor Ms. Jones could identify defendant in the courtroom. Mr. Brooks explained that because the lighting conditions were not ideal at the time of the incident, he was not able to positively identify defendant in the courtroom. Ms. Jones testified that she had identified defendant at the show up.

¶ 9 Defendant did not testify nor did he present any witnesses who testified on his behalf. The trial court found defendant guilty of aggravated robbery and ordered a presentence investigation report (PSI report). The health history section of the PSI report revealed that defendant has a limp and wears a brace due to nerve damage in his left leg which was caused by a gunshot wound. The report did not indicate whether defendant was receiving current medical treatment for this condition.

¶ 10 Defendant filed a posttrial motion to reconsider the finding of guilty or, in the alternative, for a new trial. At the hearing on the posttrial motion, defense counsel argued that the State failed to prove defendant guilty beyond a reasonable doubt where there were issues as to his identification. The trial court denied defendant's posttrial motion and sentenced defendant as a Class X offender to 12 years' imprisonment, followed by a three-year term of MSR and assessed certain fines and fees. Defendant's motion to reconsider sentence was denied. Defendant now appeals.

¶ 11 Defendant argues that his cause should be remanded to the circuit court for a hearing under *Krankel*. Specifically, he argues that the trial record provided reasons for the trial court to suspect he was misidentified, and to question his physical ability to be involved in the foot chase described by Officer Serrato. Therefore, the PSI report which revealed his leg injury from a gunshot wound would have given the trial court a "clear basis" to suspect ineffectiveness of counsel for a failure to present medical evidence to support a theory of misidentification.

¶ 12 The State responds that because defendant never made any specific allegations or claims of ineffectiveness nor otherwise complained about defense counsel, the trial court had no clear basis to conduct an inquiry under *Krankel*.

¶ 13 The rule pursuant to *Krankel* is that where a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court should conduct an adequate inquiry into the factual basis of the claim. *People v. Moore,* 207 Ill. 2d 68, 79 (2003). "[A] *pro se* defendant is not required to do more than present his or her claim to the trial court[]." *Id.*

¶ 14 Although the pleading requirements for a *pro se* allegation of ineffective assistance of counsel are somewhat relaxed, "some minimum requirements must be satisfied by a defendant in order to trigger preliminary inquiry by the trial court." *People v. Walker,* 2011 IL App (1st) 072889, ¶ 34. Defendant must provide some factual specificity before the trial court is required to consider his allegations of ineffectiveness. *Id.*; *Cunningham,* 376 Ill. App. 3d at 304). "Mere awareness by a trial court that a defendant has complained about his counsel's representation imposes no duty on the court to *sua sponte* investigate a defendant's complaint." *Id*. If the trial court determines that the claim of ineffectiveness lacks merit or pertains solely to trial strategy, the court need not appoint new counsel. *Moore,* 207 Ill. 2d at 78.

¶ 15 Defendant acknowledges he made no specific allegations of ineffectiveness or otherwise complained about his counsel's performance in the trial court, but maintains this fact is not fatal to his request that we remand for a *Krankel* inquiry. Defendant essentially argues that under *Krankel*,

the trial court had the obligation to formulate on its own, the claim of ineffectiveness, which he now asserts, then initiate an inquiry into the factual basis of the claim where the record reveals evidence of possible neglect.

¶ 16 In declining defendant's invitation to expand *Krankel* in this manner, we first find that the statements in the PSI report about defendant's medical history were not sufficient to trigger a *Krankel* inquiry, even in light of the identification evidence at trial and the testimony as to the police chase. See *People v. Harris*, 352 Ill. App. 3d 63 (2004). In *Harris*, the defendant made complaints about his defense counsel during a presentence investigation which were contained in his PSI report. *Id*. at 72. However, defendant did not bring his complaints to the court in a written or oral motion. *Id*. The *Harris* court concluded that the complaints in the PSI report were "insufficient to raise a claim of ineffectiveness assistance to the trial court and did not warrant a *Krankel*-type inquiry." *Id.*, see also *People v. Reed*, 197 Ill. App. 3d 610, 612 (1990) (where allegations of ineffectiveness are contained only in the PSI report, a *Krankel* inquiry is not required). Here, the PSI report did not contain allegations or claims that defendant's counsel was ineffective, but that defendant had a leg injury which caused him to limp and wear a brace. This self-disclosed medical background does not suffice to form a claim of ineffectiveness requiring a *Krankel* inquiry.

¶ 17 Defendant cites *People v. Williams,* 224 Ill. App. 3d 517 (1988), as support for his proposition that a trial court has the duty to act *sua sponte* where the record provides a clear basis for an allegation of ineffectiveness, even where a defendant has not raised a claim of ineffectiveness. In *Williams,* defense counsel brought a motion for a new trial setting forth that there were additional witnesses who were not called, although they may have supported the defendant's alibi defense. *Id*. at 521-23. On appeal, in considering the claim that a *Krankel* hearing was necessary, the *Williams* court first noted that the defendant had not made a written claim of ineffectiveness of counsel, but that the record showed that the trial court was aware of counsel's possible neglect in failing to call the witnesses. *Id*. at 524. The *Williams* court concluded that where there is a "clear basis" to raise

an allegation of ineffectiveness of counsel, as there was in that case, a defendant's failure to raise the allegation did not result in a waiver of the ineffectiveness claim. *Id*. The matter was remanded for a preliminary inquiry into counsel's performance. *Id*.

¶ 18 The decision in *Williams*, was explained in *People v. Gillespie*, 276 Ill. App. 3d 495 (1995), in this way: "*Williams* holds that when a defendant does not raise the issue of ineffectiveness of counsel in a post-trial motion and the record reveals strong evidence that counsel had acted incompetently, fundamental fairness demands that defendant be given the opportunity to present the issue to the trial court." *Id*. at 502. However, the *Gillespie* court also made clear that "[o]rdinarily, a trial court should not be placed in a position of having to 'second-guess' defense counsel strategy." *Id*. The *Gillespie* court found no obligation on the part of the trial court to *sua sponte* conduct a *Krankel* hearing where defense counsel "followed a sound trial strategy" and relied on the prosecutor's inability to prove its case. *Id*. at 503.

¶ 19 Defense counsel here pursued a viable trial strategy in choosing to make the State prove defendant's guilt beyond a reasonable doubt. Defense counsel elicited testimony as to the ability of Mr. Brooks, Ms. Jones, and Officer Serrato to identify defendant. Defense counsel cross-examined Officer Serrato with regard to defendant's use of a cane in court, and defendant's statements about his leg injury at the time of his arrest. The fact that defense counsel's strategy proved unsuccessful does not support a claim of ineffectiveness. *Gillespie*, 276 Ill. App. 3d at 503 (where court held errors in trial strategy, even if in retrospect shown to be wrong, does not prove incompetence). There was no strong evidence of incompetency in this case. "Since a clear basis for an allegation of ineffectiveness of counsel does not exist, we cannot find that the trial court erred in failing to *sua sponte* examine whether defendant was provided with effective assistance of counsel." *People v. Henney,* 334 Ill. App. 3d 175, 190 (2002).

¶ 20 Defendant next argues that the period of MSR should be reduced to the two-year MSR term associated with his underlying Class 1 felony conviction and cites *People v. Pullen*, 192 Ill. 2d 36

(2000).[1]

¶ 21 The MSR term for a Class X felony is three years (730 ILCS 5/5-4.5-25(l) (West 2010)), whereas the term for a Class 1 felony is two years. 730 ILCS 5/5-4.5-30(l) (West 2010).

¶ 22 This court has previously considered and consistently rejected defendant's argument. See, *e.g.*, *People v. Brisco,* 2012 IL App (1st) 101612; *People v. Rutledge,* 409 Ill. App. 3d 22 (2011); see also *People v. Holman,* 402 Ill. App. 3d 645 (2010); *People v. McKinney,* 399 Ill. App. 3d 77 (2010); *People v. Watkins,* 387 Ill. App. 3d 764 (2009). Where a defendant qualifies for Class X sentencing, a three-year period of MSR is imposed. See, *e.g.*, *People v. Anderson,* 272 Ill. App. 3d 537 (1995); see also *People v. Smart,* 311 Ill. App. 3d 415 (2000); *People v. Watkins,* 387 Ill. App. 3d 764 (2009). We likewise reject defendant's contention that these cases were wrongly decided, and hold–consistent with our prior decisions–that defendant was properly ordered to serve three years of MSR as a Class X offender. *Brisco,* 2012 IL App (1st) 101612, ¶ 62.

¶ 23 Finally, defendant contends and the State agrees, that the section 27.3a (1.5) (705 ILCS 105/27.3a (1.5) (West 2010)) State Police Operations assessment of $15 is a fine because it does not reimburse the State for expenses incurred in a defendant's prosecution. *People v. Millsap,* 2012 IL App (4th) 110668, ¶ 31. Therefore, defendant is subject to a $5-per-day pretrial custody credit pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/110-14(a) (West 2010). Defendant served 227 days in pretrial custody. The parties also agree that the $25 Violent Crimes Victims Assistance (VCVA) assessment should be reduced to $12 because other fines were imposed. Where other fines have been imposed, the proper VCVA fine is authorized and calculated under section 240/10 (b) of the Violent Crimes Assistance Fund Act which allows for an assessment of $4 for every $40, or fraction thereof, of fines imposed against defendant. 725 ILCS 240/10(b) (West 2010). We agree with the parties and direct the clerk of the circuit court to amend

[1] The State contends defendant "was convicted of the Class 2 offense of aggravated robbery." However, aggravated robbery is a Class 1 felony. 720 ILCS 5/18-1(c) (West 2010).

the fines and fees order to reflect a full offset against his $15 State Police Operations fine by the time-served credit, and a reduction of the VCVA assessment from $25 to $12. *People v. Martino,* 2012 IL App (2d) 101244, ¶ 54.

¶ 24 For the reasons stated, we affirm the judgment of the circuit court of Cook County and modify the fines and fees order as stated.

¶ 25 Affirmed; fines and fees order modified.